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United States District Court

Northern District of California

Before The Honorable Elizabeth D. Laporte

Oracle Corporation, )

)

Plaintiff, )

)

vs. )

No. C07-1658 EDL

)

SAP AG, et al., )

)

Defendants. )

)

San Francisco, California

Thursday, July 24, 2008

**Reporter's Transcript Of Proceedings****Appearances:**

For Plaintiff:

Bingham McCutchen

Three Embarcadero Center

San Francisco, California 94111

**By: Geoffrey M. Howard, Esquire****Holly A. House, Esquire****Zachary Alinder, Esquire**

Oracle, USA, Inc.

500 Oracle Parkway, M/S 50p7

Redwood City, California 94070

**By: Jennifer Gloss, Esquire**

(Appearances continued on next page.)

**Reported By:****Sahar McVickar, RPR, CSR No. 12963****Official Reporter, U.S. District Court****For the Northern District of California**

(Computerized Transcription By Eclipse)

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**Appearances, continued:**

For Defendant: Jones Day  
1755 Embarcadero Road  
Palo Alto, California 94303  
**By: Jane Louise Froyd, Esquire**

Jones Day  
717 Texas, Suite 3300  
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**By: Scott Wagner Cowan, Esquire**

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Thursday, July 24, 2008

3:00 p.m.

P R O C E E D I N G S

**THE CLERK:** Calling civil 07-1658, Oracle Corporation, et al versus SAP AG, et al.

Counsel, please state your appearances for the record.

**MR. HOWARD:** Geoff Howard for Oracle Corporation. With me, Holly House, Zack Alinder and Jennifer Gloss from Oracle.

**MR. MCDONELL:** Good afternoon, Your Honor. Jason McDonell for defendants, with Scott Cowan and Jane Froyd with Jones Day. And Mr. John Hickey from the SAP legal department.

**THE COURT:** Good afternoon.

All right, so what's the progress?

**MR. HOWARD:** Your Honor, we have submitted to you a -- I'm going to address the first item in the -- in the report that we submitted to Your Honor, which is the extrapolation proposal.

We have worked very hard and in parallel with the beginning of the remote access inspection, which has been progressing slower than we might have liked, but, nevertheless, certainly progressing.

We have been looking, from our conference room, at their servers and exploring them and trying to figure out a

1 systematic way to tag things for later inspection and  
2 production. That is an important background to the  
3 extrapolation proposal.

4 We have submitted to the defendants a -- a detailed  
5 proposal on extrapolation in which we have attempted to address  
6 what we think is the most -- currently the -- the more  
7 significant, but also the more fully fleshed-out area of  
8 discovery, which are the local environments envisioned by your  
9 order and the support materials that were generated using those  
10 environments.

11 There are other areas that we think would be  
12 susceptible, likely very susceptible, to sampling, but we are  
13 going to need some additional discovery in order to come back  
14 with a proposal on those.

15 It is a draft proposal. We have had a meet and  
16 confer on it. And, on our side, I think we would like to  
17 finalize it, at least in -- resolve what we can agree to and  
18 not agree to by the time of the next discovery conference in  
19 August, and either submit a joint proposal to you or submit  
20 competing proposals and ask you to make a ruling.

21 **THE COURT:** All right.

22 What are your thoughts on that?

23 **MR. COWAN:** Your Honor, I think Mr. Howard  
24 accurately reflects the progress. There is a couple of things  
25 we'll comment on.

1           One, for this initial piece, that they presented in  
2 this proposal, it addresses updates and fixes and a number of  
3 other things that we believe aren't as directly tied to the  
4 data warehouse issue as they do. For all practical purposes,  
5 as we sit here today, I don't know that it's that relevant  
6 because we are where we find ourselves. But, with that, I  
7 think we do have, still, faith that there is a way through this  
8 to do it and do it in an efficient way.

9           The real issue, as with anything, comes down to the  
10 details. And, what we want to make sure of, through this  
11 proposal, is that the end result is a fairly accurate, or as  
12 accurate as possible, representation of what the reality is,  
13 not some mechanism that the parties create themselves to agree  
14 what a alternative reality is.

15           **THE COURT:** Um-hmm.

16           **MR. COWAN:** And so we have engaged a statistician,  
17 an expert statistician, to look at it and comment on their  
18 proposal. There is a number of fundamental gaiting issues  
19 there, that we have talked to them on the meet and confer. I  
20 won't bore the Court with the details, unless you want to hear  
21 them.

22           **THE COURT:** Well, I think -- let me make this  
23 preliminary observation: I think that if you don't stipulate  
24 to waive -- waive objections as to whether it's essentially  
25 reliable enough to be admissible testimony, I don't think I can

1 order you to that effect. I doubt, I mean, on first blush.

2 I might be able to order you to do something that  
3 you didn't stipulate to, that was statistically significant,  
4 you know, and did -- not otherwise vulnerable to the challenge  
5 that it was inadmissible.

6 I would -- seems to me you could waive that, if you  
7 wanted to. And, I mean, you know, I -- often people bring  
8 motions in limine about unreliable expert testimony, and it  
9 goes to the weight, and, you know, it's overruled. But, but --  
10 you know, if you can agree on something that you are both  
11 comfortable with, as being statistically valid, that's fine  
12 with me.

13 I think it's wise to, even if so, to include such  
14 provision, if you can stipulate to it, because it just  
15 eliminates the uncertainty. The fact that, you know, some  
16 statistician somewhere can say anything that is not reliable  
17 and it would just create trouble. But, that is just an  
18 observation.

19 **MR. COWAN:** Right. And I think that's very helpful,  
20 Your Honor, for us to try to get closer to finding a middle  
21 ground here because we, our clients, defendants have as much of  
22 a vested interest, we think, as plaintiffs do in trying to cut  
23 through a lot of the expense associated with comprehending and  
24 presenting the whole to a jury.

25 **THE COURT:** And possibly more so.

1           **MR. COWAN:** Potentially, more so, given the concerns  
2 that we have raised about the cost of discovery, et cetera,  
3 absolutely.

4           And -- but the issue is, for us to be able to advise  
5 our client, hey, we believe this process, regardless, if you  
6 went the full way or this way, you are going to come out the  
7 same way, we have to have a high level of confidence that the  
8 two are going to --

9           **THE COURT:** All right. I know one of the client's  
10 representatives is here, I mean, you could -- I think there is  
11 something to that, but, I mean, I would think that also, and I  
12 would -- I long ago studied some political science philosophy,  
13 and there is the theory of the veil of ignorance, if any of you  
14 know John Rawls; do I see anybody?

15                           **(Laughter.)**

16           **MR. HOWARD:** I did read him. Do I know him? I  
17 can't say at that point.

18                           **(Laughter.)**

19           **THE COURT:** In other words, well, anyway, if nobody  
20 knows who it's going to favor, and there is no reason to think  
21 it's going to favor one side or the other, and you may never be  
22 able to know what the, quote, "real reality" is, if that would  
23 require, you know, a hundred years and a billion dollars, then,  
24 you know, provided that the process is such that it's not  
25 skewed to favor either side, it ought to be something you may

1 be able to live with.

2 **MR. COWAN:** I think, conceptually, it sounds like we  
3 are all on the same page, on that point.

4 There are a number -- as you can imagine, there are  
5 a number of different categories of data that will lend  
6 themselves to extrapolation in different ways.

7 **THE COURT:** Right.

8 **MR. COWAN:** It's not just taking a huge subset,  
9 taking the data -- taking a huge collection of data, taking a  
10 subset of that and making the same extrapolation across the  
11 board. There will be have to be dividing those into baskets  
12 and determining, okay, of these things that are in baskets how  
13 can they be extrapolated. And that is where we are.

14 **THE COURT:** Well, and I can see you want to make  
15 sure that, somehow, the baskets aren't such that they  
16 overrepresent an area where you might have more problems than  
17 some other subset.

18 **MR. COWAN:** Absolutely.

19 **THE COURT:** That should be doable. You put in a lot  
20 of categories. And, you either think there should be other  
21 categories on top of that or --

22 **MR. HOWARD:** We put in the categories we are aware  
23 of.

24 **THE COURT:** Um-hmm.

25 **MR. HOWARD:** Without trying to cherry-pick the ones



1 that we thought there were more or less of. And we put the  
2 language in that you say you randomly select within those  
3 categories.

4 Then, I think you get, from that, what you get from  
5 that. The point is that you are sampling. And then, each side  
6 has its arguments from that subset, but you are not stuck with,  
7 having been precluded for cost considerations from having gone  
8 beyond -- to getting beyond the sample you get to use the  
9 sample, to, you know, make your arguments about the evidence  
10 that you would find in the larger universe that, for cost  
11 considerations, you weren't allowed to explore.

12 **THE COURT:** Um-hmm.

13 **MR. COWAN:** I do have one comment on that because, I  
14 think, that is where we have a fundamental disagreement.

15 We believe that we will have to agree on, not only  
16 how we take the sample, how we select the sample, but what the  
17 sample size is, et cetera, which is a more procedural piece.  
18 But, the substantive piece of that is which characteristics of  
19 the sampled items are going to be analyzed, and how are those  
20 characteristics going to be extrapolated to be the evidence for  
21 the entire population?

22 And, I think what I heard Mr. Howard suggest, which  
23 is consistent with what is in their current proposal is, no,  
24 they'll decide that later, after they look at the sample set  
25 and see what the characteristics are of the sample set, and try

1 to take advantage of whatever's there.

2 We cannot agree, ahead of time, to say, okay, here  
3 is how we are going to select the sample, and then agree to be  
4 bound by whatever comes out of it without understanding the  
5 methodology that, once the sample is selected, how is that  
6 sample going to be used to be extrapolated? Which stiff  
7 attributes of the data are going to be extrapolated for the --  
8 you know, into the entire population? And, that is a big, big  
9 difference of opinion.

10 **THE COURT:** Why is that?

11 **MR. COWAN:** Because anyone, any good lawyer and any  
12 good expert, given any population, can twist or turn whatever  
13 they want with a given set of data, but -- and that's fine when  
14 you are dealing with a whole. That is what lawyers and experts  
15 do for a living. But, when you are trying to extrapolate a  
16 small set and have the implications across the entire universe,  
17 it's much more -- there needs to be much more precision about  
18 how that is done and an agreement up front of how that's done.

19 **MR. HOWARD:** And, I think, Your Honor, that's  
20 exactly where the veil of ignorance comes into play, because we  
21 all don't know, and we -- it would defeat the point of the  
22 exercise, if we were to -- to attempt to, or set as a goal,  
23 figure out where we're going before we start the path to get  
24 there. We don't know what we are going to find in the sample  
25 set. The point is that you create a sample set, and then it's

1 sort of every side for themselves as to what they get from  
2 that.

3 But, to take what Mr. Cowan just said to its logical  
4 extreme, for example, if there was a test document within a fix  
5 in the sample set, and we wanted to argue that there was ten  
6 pages in every fix document, we would have to, before we embark  
7 or this or agree on it, know that there is ten pages in the fix  
8 document in the sample set so that we could say there is ten  
9 pages in every test document.

10 And that's just not the point of the exercise. The  
11 point is to bound a category, an identifiable category, select  
12 it in a fair way, select the subset from it in a fair way, and  
13 then, whatever is in there is in there.

14 We don't, know, you know, what it is that we are  
15 going to argue from that. We have a good idea about some  
16 things, but to be able to say with certainty every single  
17 evidentiary characteristic or fact that you would want to draw  
18 from what is still going to be a very complicated set of  
19 materials is a -- is allowing the perfect to defeat the good  
20 and is going to make it, I think, logistically, impossible to  
21 embark on the exercise.

22 **MR. COWAN:** I think it is doable, and here is why.  
23 They have brought a number of claims against our clients. Each  
24 of those claims has a series of elements. They know already  
25 what data points they need to prove each element of their

1 claim. They have already taken extensive deposition discovery  
2 of our client through 30(b)(6) depositions. They have all  
3 these, or many of these, fixes available and have been  
4 analyzing them and questioning our witnesses about them.

5 They know the attributes of these updates and fixes  
6 and these environments that they are concerned about. They  
7 know which ones they think create the liability implication.  
8 They can identify up front how they intend to use those  
9 attributes to extrapolate across the population, and that's the  
10 big difference. They don't want to show their hand, at this  
11 stage in the process, where we, then, can consider that and  
12 say, yeah, okay, we'll agree, we'll take that, and, as you say,  
13 waive what otherwise would be a substantive right of how the --

14 **THE COURT:** I don't have -- I can't say right now,  
15 or won't say what I think makes more sense on those things, and  
16 it may not need to be, but it seems to me that it's one thing  
17 if you are saying waiving any arguments of statistical  
18 significance when you really think there genuinely may be some.

19 **MR. COWAN:** Correct.

20 **THE COURT:** Alternatively, you two agree on a large  
21 enough sample set and a good enough -- I mean, the random seems  
22 fine, I don't know how you can object to that, but determining  
23 the size you have to know the population and what percentage  
24 you are taking, I assume, to know whether it's statistically  
25 significant.

1           If you can agree on that -- I still think a waiver  
2   is a good idea, but, in reality, you are not really waiving  
3   anything. You are assuming that it's not really genuinely  
4   attackable. It just would be sort of an exercise in lawyering  
5   that, otherwise, might get engaged in, but shouldn't be.

6           At that point, I don't know whether you need to know  
7   what they were going to do with it because, if it's genuinely  
8   statistically representative, it should be correctly predicted.  
9   So, but, I don't know where you are going to end up on that.  
10   So, why don't you see.

11           Seems to me that that would be more -- in other  
12   words, if you were really satisfied that it was going to be a  
13   very adequate representative sample, there shouldn't be any  
14   reason to think that whatever method they pick is going to  
15   matter in terms of the -- that it's not a cherry-selected  
16   sample, and it's validly predicted by the universe.

17           **MR. COWAN:** And, I think that's the point.

18           **THE COURT:** So there can't be any skewing under that  
19   set of assumptions.

20           **MR. COWAN:** Potentially. And, I think that's the  
21   point that Mr. Howard's making.

22           And, our point is, simply, we don't know until you  
23   see the set. And, what we may end up coming back -- we may, I  
24   hope, and Mr. Howard and I talked before the hearing and we  
25   have had substantial discussion in meet and confer, I hope we

1 come back in August and say: here are the things we have agreed  
2 to, here are some examples from both sides of why they think  
3 they are right, why we think we're right on more of these  
4 issues where we can physically show them to you, maybe much in  
5 the same way we did some of the technical issues where you can  
6 see the attributes. And then, that may help.

7 **THE COURT:** Well, maybe.

8 It would seem to me you want to have your  
9 statistical experts talking to each other.

10 **MR. COWAN:** We agree.

11 **MR. HOWARD:** That is what we discussed before the  
12 hearing, Your Honor.

13 **THE COURT:** I think that is essential, ASAP.

14 And maybe you could also, you know, maybe there is  
15 some middle ground where you don't have to disclose everything  
16 you could possibly do, but you run through some test examples,  
17 or something.

18 **MR. COWAN:** Exactly, and, at least, have a good feel  
19 for at least some of the attributes and try to understand where  
20 we're headed.

21 **THE COURT:** There must be some that are no big  
22 surprise.

23 **MR. HOWARD:** I think the idea that we are trying to  
24 hide the ball, here, I don't think is quite fair. The detail  
25 of the proposal itself addresses exactly the attributes and the

1 things that we are examining. It's very carefully spelled out.

2 **THE COURT:** There could be another way to do it.  
3 You could agree that there are certain things you are going to  
4 look at. And, to the extent that you are, rather than trying  
5 to hide the ball trying to keep from precluding yourself from  
6 something you later realize is very significant, you could have  
7 a two-tier thing and see if you could stipulate to that, and,  
8 if not, have some kind of motion -- to me, is that, in any way,  
9 abusing the sampling? Or, is it a fair --

10 **MR. COWAN:** I think that's an excellent idea.

11 **THE COURT:** I'm not crazy about that because it's  
12 more problems for me.

13 **MR. COWAN:** I understand. But, that might be a way  
14 to get past some of the impasse, is to get -- do this thing in  
15 phases and get to that point.

16 There's one thing that Mr. Howard said that spelled  
17 out the attributes, and you may not want to focus on this now,  
18 or even later, but let me point you to one place in the  
19 proposal where, to me, it's kind of the gating issue of what we  
20 are taking about.

21 **THE COURT:** I saw a lot of the use of the word  
22 "generally"; is that what you're going to --

23 **MR. COWAN:** No, it's two things.

24 One, their proposal, really, the meat of it, if you  
25 will, doesn't begin until page 6, line 9.

1           **THE COURT:** Um-hmm.

2           **MR. COWAN:** I'm sorry, page 5, line 24. And so,  
3 it's really about two pages of the technical part. The rest of  
4 it is all definitional and prefatory.

5           But, if you turn to line 10, page 6, they are  
6 talking about taking the arithmetic -- at lines 9 and 10:

7           "The parties agree that for any given characteristic  
8 of the fixes and updates in the sample set, the arithmetic mean  
9 of that characteristic across the sample set shall be  
10 admissible at trial." That sentence is what we are focused on,  
11 because that is where the rubber hits the road, in terms of  
12 what the implications are on our client.

13           What we need to know is what characteristics are  
14 being, you know, dealt with, because you are taking some  
15 subjective interpretations of characteristics, having to give  
16 them some numeric quantifier and then taking a numeric mean.  
17 And, we've got to know how that's going to translate. So that  
18 is where I think we are going to spend the bulk of our --

19           **MR. HOWARD:** If I may, just briefly, Your Honor,  
20 this is already constrained discovery. If this was a case  
21 about one fix, we would be entitled to explore that fix, in  
22 detail, without two tier, without this kind of bounding. And  
23 so, if we are going to have a sample set, it ought -- we ought  
24 to have the same type of discovery with respect to the sample  
25 set that we would have in the -- in the pursuit of evidence and



1 facts, generally.

2 So, we are happy to talk about characteristics, but  
3 you're right, it is important not to be precluded from finding  
4 what people find when they go through discovery in general.

5 **THE COURT:** Okay, well, I mean, this is -- a lot of  
6 this is a chicken and the egg issue. If you can phase it or  
7 figure out -- I think that it's true -- I mean, again, I know  
8 less than you do, by far, and would prefer to keep it that  
9 way --

10 (Laughter.)

11 **THE COURT:** -- but -- and operate on a need-to-know  
12 basis because there are a lot of other things I need to know  
13 about.

14 But, I can understand the idea that, if you don't  
15 know -- if there is a way of manipulating what a mean is by how  
16 you define characteristic that that could be problematic.

17 And so, you know, maybe you need to have a sample  
18 list of characteristics. And then, if a like thing had to be  
19 added, that might be okay, but something that would sort of  
20 allow "mean" to be more subjective where something else might  
21 not be.

22 I mean, you know --

23 **MR. HOWARD:** Let's work on this.

24 **THE COURT:** Yeah. But, I think the concept is a  
25 good one, I still think so. I want you -- I know it's

1 difficult to move fast, but we really have to, given the  
2 schedule.

3 **MR. COWAN:** And we are.

4 As Mr. Howard indicated, we are continuing with the  
5 data warehouse, working with them, working through any  
6 technical issues on that part of it. We think a lot of this  
7 can take place in parallel with the discovery we are doing.

8 **THE COURT:** All right.

9 I do think you should get your statistical experts  
10 together right away. To the extent they can agree on what is a  
11 statistically valid means of sampling, that is going to  
12 eliminate a lot of the fear.

13 **MR. COWAN:** Okay.

14 **THE COURT:** Because you are just no worse off than  
15 you would be, except you are saving a ton of money and time.

16 **MR. COWAN:** Exactly.

17 **THE COURT:** What else do we need to talk about?

18 **MR. COWAN:** One issue, before I forget, and I have  
19 talked to opposing counsel about this before we came in; on the  
20 DOJ materials, just so you understand, we are continuing,  
21 despite our taking objection to the ruling you made last time,  
22 we are continuing to ready those documents for production. If  
23 we're unsuccessful in pursuing --

24 **THE COURT:** You know, I issued a timing order.

25 **MR. COWAN:** You did, and we are thankful for that,

1 but I wanted to raise one issue.

2 In your order, you specified that we could not list  
3 any privileged documents because of Ms. Boersch's  
4 representation that we are not waiving the privilege in  
5 communicating with the DOJ, and we are not. But, we have  
6 undertaken a substantial review of the delta between what has  
7 already produced to them versus the DOJ, what you ordered us to  
8 produce, to look for those things that are wholly irrelevant,  
9 and log those. And, we have made substantial progress, and we  
10 will be able to meet the time lines if, in fact, we are ordered  
11 to do that. But there are 11 documents that we have discovered  
12 that are privileged that we are communicating with the U.S.  
13 Attorney's Office on a claw-back procedure. So there will be  
14 11 documents that will show up --

15 **THE COURT:** If you succeed in clawing them back.  
16 But we need a timetable for that, I suppose.

17 **MR. COWAN:** I would expect we can effect that this  
18 week. We just discovered it -- it was just brought to my  
19 attention last Friday. I didn't want to be here today -- we've  
20 communicated with the DOJ, and I wanted to make sure -- I  
21 didn't want to be here, and not tell you that. So, that was  
22 just an issue.

23 **THE COURT:** You want to comment on that?

24 **MS. HOUSE:** I think we'll just wait to see what the  
25 redacted log looks like.

1           **THE COURT:** If you succeed in clawing them back,  
2 unless there is some argument I haven't thought of, I would be  
3 inclined to say, then, they're still privileged.

4           In general, I am very much a believer and supporter  
5 of claw-backs because I think that the volume of discovery is  
6 such that you can't work without them.

7           **MR. COWAN:** I wasn't pleased that there were 11  
8 there, but, quite frankly, given the volume, it's a very  
9 reasonable portion involved.

10          **THE COURT:** So, yeah. My idea there, obviously, is  
11 that obviously, if Judge Hamilton reverses that, that is what  
12 is going to govern. But, if she doesn't, I want to keep thing  
13 moving.

14          **MR. COWAN:** We understand that. And that is why we  
15 will stand ready to comply, if we're put in that situation.

16          **THE COURT:** All right.

17          **MS. HOUSE:** Just moving down the list, the damages  
18 causation evidence --

19          **THE COURT:** Um-hmm.

20          **MS. HOUSE:** And that still remains in flux. We had  
21 expected to have an annotated list from the other side per your  
22 order; the list we got was not annotated.

23          We have had a meet and confer with the other side  
24 about that; they are going to get us more information. We  
25 think that information is necessary in order to figure out what

1 additional delving down is going to be required. In addition  
2 to the materials, they gave us some samples; we don't think  
3 that materials that they provided us -- the general material --  
4 is comparable to what we have provided. But, in order to  
5 really figure out what did additionally we need and from which  
6 customers we want to start that process because, obviously,  
7 with a limited amount of time we want to focus, as you  
8 suggested, on the ones that are most likely to be the hot ones.  
9 But, we are still awaiting information from them on that. And,  
10 I think we have to just defer a discussion on where we are on  
11 that until the next conference on the 28th.

12 **THE COURT:** So there was a -- was the prioritized  
13 list of customers due on Friday?

14 **MS. HOUSE:** Right, per your order. And we got a  
15 list, but it was just a non-prioritized alphabetical list of 61  
16 customers with no gradation at all. According to our last  
17 conference about, you know, gee, which one -- there is specific  
18 language in your order, we called it to their attention. They  
19 have come back with a proposal to give us additional  
20 information. We'll evaluate that once we get it. I don't know  
21 -- I would like to know when I am going to get it.

22 **THE COURT:** So what is the story with the holdup on  
23 that?

24 **MR. MCDONELL:** Yeah, let me tell you the background.

25 So, the subject here is which customers of SAP will

1 be subject to discovery, especially as it relates to the  
2 causation of damages issue. And, when we were last here, I  
3 think I was the one who raised this issue and explained to the  
4 Court that there was -- for this discovery to exist at all, the  
5 starting point would be, well, did the customer have a  
6 TomorrowNow contract at all, and then, if so, did the customer  
7 also have an SAP contract? And, you had made some insightful  
8 comments about that about, well, how can you -- well, excuse me  
9 for --

10 **THE COURT:** Groveling?

11 **(Laughter.)**

12 **MR. MCDONELL:** Yes, thank you.

13 You had followed up on what I said, that even within  
14 that class of customers for which there is both a TomorrowNow  
15 and an SAP contract that there are going to be variations on  
16 the theme.

17 **THE COURT:** Right.

18 **MR. MCDONELL:** And I knew that, generally. And I'm  
19 absolutely convinced that there is going to be variations. And  
20 you said, well, why don't you give that them that list and  
21 annotate it so the clear ones are clear and the fuzzy ones are  
22 fuzzy. And I said that is what we will do.

23 So, we went back and began trying to do that. And,  
24 as fate would have it, it's not at all a simple task. In fact,  
25 as we thought about it, the things we can do and are proposing

1 to do are to get objective data points that should assist in  
2 this process.

3 So the things that made sense to us were to get the  
4 list of customers and to take all of the customers that we have  
5 been able to confirm as both a TomorrowNow and an SAP contract.  
6 So, that is the universe.

7 Then, in terms of trying to get some data with which  
8 to do an evaluation of that, it seemed to us the things that  
9 made sense would be contract dates -- now, they have all the  
10 TomorrowNow contracts, so that is not at issue. The product's  
11 at issue. So SAP sells a number of products, and then by  
12 giving products that the SAP customer has, they can do whatever  
13 mapping they think is appropriate back to the TomorrowNow  
14 contract.

15 Contract dates, if we can get them, and the plot  
16 thickens a little bit on that, but we should be able to, and  
17 then, dollar volumes of the contracts. And by getting that  
18 objective data, then either side can draw whatever conclusions  
19 they want about what it all means.

20 But, we concluded that we didn't think that the  
21 right thing to do would be to try to do the subjective  
22 qualitative kind of statements about, well, we think this one  
23 is a winner and that one is not, because that is what the  
24 discovery is ultimately intended to be directed to.

25 So that is -- I have told counsel that that is what

1 we are working on. Tougher than we thought. There is no --

2 **THE COURT:** How many are we talking about?

3 **MR. MCDONELL:** Sixty-one.

4 **THE COURT:** When do you think you can do that?

5 **MR. MCDONELL:** My goal is to have it done before we  
6 are back here on August 28th and to provide them with whatever  
7 list we have. And obviously, we have an incentive to get this  
8 done.

9 **THE COURT:** That just seems like a long time. Maybe  
10 you can do it at least in a rolling fashion.

11 What are your thoughts on that?

12 **MS. HOUSE:** And then, in addition, we need to see  
13 the underlying contracts, which we also haven't received.

14 Part of the problem is this was all supposed to be  
15 the filler information that would then inform our discussion  
16 about what additional information we need in order to figure  
17 out what really was the motivation behind going to an SAP  
18 application.

19 So, every one of these is just a stage to the next  
20 thing. Obviously, the sooner we can get that underlying  
21 information, the soon are we can say, well, gosh, we want to  
22 start with these top ten and get this kind of e-mail that has  
23 to do with the customer's -- that anything that customer had to  
24 say about TomorrowNow or what, you know, because that is the  
25 piece of the contract that we find the most interesting, how



1 did the TomorrowNow piece of the puzzle work to entice them  
2 into the SAP purchase.

3 **MR. MCDONELL:** And, I'm not proposing to slow down,  
4 in any way, the production of the SAP contracts themselves for  
5 these 61 customers. So, to the extent that we have obtained  
6 the customer files for those 61, and, I believe, it's the  
7 majority, by far, we should have them all by next week, I hope,  
8 we'll produce those. So we'll get that rolling right away.

9 **THE COURT:** All right. So, produce the actual  
10 contracts by next week. Is that --

11 **MR. MCDONELL:** Unless, I put my foot squarely in the  
12 mouth again --

13 Ms. Freud is closer.

14 **MS. FROYD:** We have been collecting them from the  
15 U.S., and I think will be able to get the vast majority of the  
16 North American ones done in the time period. The international  
17 ones are sort of coming in piecemeal, and will take a bit  
18 longer to collect.

19 **THE COURT:** And what -- how many are U.S.?

20 **MS. FROYD:** Unfortunately, I don't have the list in  
21 front of me. I would say at least half of them are the U.S.

22 **THE COURT:** All right. All the U.S. customers by  
23 the end of next week.

24 And, can you also give the dollar value by the end  
25 of next week for those customers?

1           **MR. MCDONELL:** Your Honor, we will try. I just  
2 can't promise I can get it done. It's a large company is about  
3 the simplest way to say it.

4           **THE COURT:** I don't want to wait a whole other month  
5 for this to get going.

6           **MR. MCDONELL:** Your Honor, I will commit to try to  
7 start pushing this information to counsel of -- you know,  
8 reasonably promptly after we get it and confirm it, and so  
9 forth, but I am doubtful that it will be completed much before  
10 August 28.

11           But, I understand the need to be working on  
12 everything simultaneously here.

13           **THE COURT:** Right.

14           **MR. MCDONELL:** So, we will push out what we  
15 reasonably think --

16           **THE COURT:** All right, I think that is as far as we  
17 go on that.

18           Search terms?

19           **MS. HOUSE:** The search terms has been, you know,  
20 meet and confer, meet and confer, meet and confer. We have --  
21 my understanding is we have the latest proposal of what the  
22 German terms are going to be, and we are running them. We have  
23 been trying to help them. There is another meet and confer on  
24 Monday.

25           I would say my understanding is that the process has

1 been, you know, courteous, and we are trying. And there seems  
2 to be hope that there will be resolution.

3 **MR. COWAN:** I think it's even stronger than that.  
4 And Mr. Alinder may confirm, at least did confirm, from the  
5 last meet and confer we had; we have a substantive agreement on  
6 a list. We are -- as you ordered us to have that agreement  
7 over a week ago, we reached that. But, we both believe we can  
8 do better than that list and are continuing to work to do that.  
9 And we're exchanging -- we're having our consultants work on  
10 this concept. And we are feeding information to -- Mr. Alinder  
11 and his team are working from their side and are commenting on  
12 it. My understanding from the last meet and confer, where we  
13 were was very close to having a final list.

14 We have, since the last hearing, reduced the number  
15 of responsive documents not hit by the search terms and  
16 increased the number of documents that won't get reviewed as a  
17 result of the search terms. So that is very good progress,  
18 absolutely.

19 We are working closely with them to get the list  
20 finalized and translate that list to German, where it can be  
21 applied to both sets of documents.

22 And, I'm hoping a week to ten days we should be  
23 done. And, correct me if I'm wrong.

24 **MR. ALINDER:** I pretty much agree with that, Your  
25 Honor, I think, you know, we've made substantial progress in

1 the last two weeks. And, I think we are continuing to make  
2 additional progress, including we are scheduled to meet on  
3 Monday specifically to work out German terms and to make some  
4 further progress.

5 **THE COURT:** Good.

6 **MR. COWAN:** And, as we indicated in the joint  
7 statement, we do not anticipate coming back to the Court for  
8 relief on that. I think we are that close.

9 **THE COURT:** All right.

10 Then the targeted searches, the issue seems to be  
11 the -- just down to whether they are correlated with previous  
12 requests for production or not?

13 **MR. MCDONELL:** That's correct, Your Honor.

14 **MS. HOUSE:** The language we propose -- we each put  
15 in different proposals for language. We feel the whole point  
16 of a targeted search is to try to ease the thing, make it very  
17 clear what it is that is targeted so you go out and shoot for  
18 the target.

19 One of the problems with the initial draft of the  
20 targeted searches we got from defendants is that they would  
21 list, in some cases, dozens of RFPs in the actual targeted  
22 search, which completely means you have to then go back, read  
23 all those RFPs, which is often two paragraphs long, then go  
24 back and read your objections, figure out if there has already  
25 been a ruling on it related to any of those RFPs from Judge

1 Legge. That sort of defeated the purpose. When the rationale  
2 came in as to why, it was, well, we don't want you to increase  
3 the number of RFPs that have been ordered.

4 All of these targeted searches are clearly the ones  
5 that are in the heart of the litigation. They are going to be  
6 covered by discovery. But having a very clear delineation of  
7 this is the search, then you know what you are responding to.  
8 To us, really made it a lot easier, both in terms of  
9 responding, but, if there is a dispute that comes up to Your  
10 Honor, then you don't have to go and have -- look at 40  
11 different RFPs and then the objections and prior rulings.

12 **THE COURT:** Right.

13 **MR. MCDONELL:** So, Your Honor, our concern was that  
14 Rule 34 does govern document discovery. Both sides have issued  
15 broad documents requests, and this entire exercise of targeted  
16 searches has evolved out of what steps the parties will take to  
17 search for responsive documents to those written document  
18 requests.

19 So, custodian searches is part of the efforts to  
20 look for those documents, but, as a supplement to that, both  
21 sides have agreed that there would be targeted searching as  
22 well. Our view is we shouldn't become completely disconnected  
23 from the document requests that are at issue because that's the  
24 foundational point here.

25 So the process the parties have established accounts

1 for any concerns counsel has about ambiguities or vagueness.  
2 We've put forth in the joint statement there a proposed  
3 process: After exchanging the targeted searches, one week  
4 later the receiving party can express any concerns about  
5 vagueness or ambiguity or objections in general and try to work  
6 them out, and at the same time try to give some type of  
7 statements about what they will do to conduct the search and  
8 how long they expect it to take. So, those types of concerns  
9 about ambiguity, and so forth, are going to be dealt with  
10 through that process.

11 But, I don't think we should suddenly be inventing a  
12 new class of discovery under the Federal Rules.

13 **THE COURT:** You have to refresh my memory.

14 The targeted searches have not been written, in  
15 other words?

16 **MR. MCDONELL:** We have exchanged drafts. We have.

17 **THE COURT:** I mean, there is something above what  
18 both of you are saying. I'm really just concerned with the  
19 practicalities. I don't want to have to parse out, just like  
20 she says. I mean, I hate those exercises. And, there is so  
21 much water under the bridge already, in this case, some of  
22 which you are asking me to redo and some of which I won't have  
23 to. So I don't want to go back into that.

24 On the other hand, I -- I mean, if a targeted search  
25 is asking something that is not fair game for discovery because

1 it's not relevant, it shouldn't be asked. And if -- and I do  
2 want to try to enforce the limit that Judge Hamilton has set  
3 for you, which is the point you made, 150. I'm not sure how to  
4 reconcile those two things.

5 **MS. HOUSE:** There's a --

6 **THE COURT:** I do think there a valid point that  
7 Oracle is making. If you agree on what the right targeted  
8 searches are, as long as they're -- it sounds like they are all  
9 going to be a subset of responsiveness to something. If they  
10 are not responsive to anything, or to something that exceeds  
11 150 requests, then it's off limits.

12 **MR. MCDONELL:** Yeah, but that is -- pardon me for  
13 a --

14 But that is part of the process though. At least  
15 saying your targeted search, what the origins of it are, so we  
16 know in writing, on the record, that it is tied back to a Rule  
17 34 document request so we know what that background is.

18 And then, if there are concerns about whether it's  
19 clear or not, the written targeted search is exchanged, and the  
20 parties can object or not object as they see fit and work it  
21 out. And, they'll have incentives to try to get it done.

22 **THE COURT:** Have 150 RFPs already been made?

23 **MS. HOUSE:** There have been numerous RFPs, and  
24 there's been numerous history on this. I mean, this --

25 **THE COURT:** Is this a concern on your part? Is this

1 really a fight over that or not?

2 **MS. HOUSE:** What you mentioned, there hasn't been  
3 any reaction, gosh, this is totally new; this is far afield.  
4 Every one of these things are clearly related to other  
5 discovery. The question is whether you have to go back, find  
6 every one of the 35 that might touch on it, mention those. It  
7 just was so unwieldy when we got their draft requests.

8 **THE COURT:** In general, I lean towards what you are  
9 saying, but -- I don't want to get into trying to parse  
10 disputes about does this relate to request 34, 38, 52 and 130  
11 or not? I mean, that just seems -- and even just the time, I  
12 picture this host of, I guess contract attorneys, running  
13 around for the next few days doing that. So, I don't want to  
14 do that.

15 On the other hand, I --

16 **MR. MCDONELL:** It just seems to us that it's a  
17 minimally burdensome thing to do your targeted request and then  
18 identify which document requests you think --

19 **THE COURT:** I guess I'm just looking at the  
20 practice. What is the end game? What is the purpose? I mean,  
21 is someone going to say, then, okay, we -- you know, I mean, I  
22 want to avoid more motions, not add to them.

23 **MR. MCDONELL:** If there is an issue down the road as  
24 to whether documents, RFPs have been responded to or not, we'll  
25 know which targeted searches were intended, at least in part,



1 to resolve or to fulfill the obligation to search and produce  
2 documents responsive to that particular RFP. Otherwise, we've  
3 got a new discovery device, a targeted search that has no real  
4 process around it.

5 **THE COURT:** The only thing that -- you know, it's  
6 not like our existing system is so wonderful.

7 (Laughter.)

8 **MR. MCDONELL:** Always room for improvement.

9 (Laughter.)

10 **MS. HOUSE:** And there is process. Everything  
11 about -- we put forward a process.

12 **THE COURT:** Just a minute.

13 But, you know, I mean, is this really, are we going  
14 to -- because if there is a motion to compel saying, well, you  
15 never responded to request 134, you know, even if we know a  
16 targeted search was part of a response to 134, that there still  
17 could be an argument, but that was just a targeted search. So,  
18 I'm just trying to look at, practically, is this going to be  
19 helpful or not.

20 **MR. MCDONELL:** In my view, it is. I don't think  
21 it's a great matter of principle. It's conceivable with  
22 further conferring on this point we can bridge this gap.

23 **THE COURT:** I mean, I lean against it, although I am  
24 concerned about, you know, I have got to enforce limit that  
25 Judge Hamilton set.

1 I just think, I mean, often people -- we spend  
2 ridiculous amounts of time with something that is clearly  
3 relevant, if it is, as to did it fall under this request, or  
4 that request, and the other request, and who cares? You know  
5 and that's where I am --

6 **MR. MCDONELL:** But, all the stuff has a purpose.  
7 For example, as counsel mentions, there were objections to  
8 those original requests. And, for example, both sides objected  
9 on privilege grounds to each and every one. And I wanted to  
10 know that those objections are still there, valid, on the  
11 record, and those are not being waived or --

12 **THE COURT:** Okay, well --

13 **MR. MCDONELL:** -- superseded, and that we don't have  
14 to restate them all.

15 **THE COURT:** All right, so can I just simply say that  
16 all privilege objections apply to the targeted searches?

17 **MR. MCDONELL:** I believe that would be appropriate.

18 **THE COURT:** Okay.

19 **MS. HOUSE:** That's fine.

20 And as part of the response, you can put your  
21 classic, you know, protective language, are you saying, you  
22 know, insofar as prior objections --

23 **MR. MCDONELL:** But, then we are cycling all over  
24 again.

25 **MS. HOUSE:** But, the point is -- was you've

1   referencing 30 RFPs in a targeted search makes it not --

2           **THE COURT:**   Okay.

3           **MS. HOUSE:**   Creates confusion.

4           **THE COURT:**   I would prefer not to do it.  You can  
5   talk some more.  If there are some particular reasons, though,  
6   let's try and address those.  I'm happy -- do you want some  
7   language that you can agree on, along those lines, so that  
8   objections are preserved --

9           **MR. MCDONELL:**  Very well.

10          **THE COURT:**   Okay.

11          Board minutes:  Agreed to, I think.

12          **MS. HOUSE:**   Yeah, that's a good one.

13          **THE COURT:**   All right.  And so, now, you are talking  
14   about a host of future motions.

15          **MS. HOUSE:**   And we know how crowded your calendar  
16   is, and that is why we thought you we better talk to you about  
17   getting on that calendar.

18          **THE COURT:**   Well, getting on, and then do you really  
19   need to bring all these motions?

20          **MS. HOUSE:**   Mr. Howard wants to talk about the first  
21   one, which had actually been cycled through on the very first,  
22   I think, conference we had --

23          **MR. HOWARD:**   Yeah.

24          The one that doesn't fit in the set, I think, is the  
25   privilege document motion.  We did have some colloquy about

1 that earlier. You expressed, I think, if I'm paraphrasing you  
2 accurately, a preference to have just a look at representative  
3 documents and categories that we might identify. And, we think  
4 that's perfectly fine. In fact, we would be happy with, you  
5 know, a small amount of briefing to have you look at what we  
6 would identify as representative documents in certain  
7 categories. And, we can even do that, you know, more quickly  
8 than the regular schedule because, I think, there will be a  
9 ripple effect from whatever your ruling is, probably, on those  
10 documents.

11 **MR. COWAN:** And, I think that's fine, Your Honor, as  
12 long as we know ahead of time what specific documents are going  
13 to be at issue. We either will resolve them, or stand on our  
14 objections. I think that's fine.

15 **THE COURT:** How many are you thinking?

16 **MR. HOWARD:** Well, there are many documents that have  
17 been clawed back on privilege -- let me give the broad context.

18 There are several privilege issues that are  
19 percolating in the background. We don't think it makes sense  
20 to bring them all to you right this second. There are a couple  
21 of categories that we think we do need guidance on, for  
22 example, documents that we just think are just not privileged;  
23 documents where the privilege has been waived for one reason or  
24 another, but, where there are many other documents stacked up  
25 behind them that are like the -- what the representative

1 document would be.

2 What we would like to do is put three documents,  
3 maybe, in each category, or some very small number --

4 **THE COURT:** How many categories? Three times what?

5 **MR. HOWARD:** I think two categories, initially.

6 **THE COURT:** Um-hmm.

7 **MR. HOWARD:** And then, I think, in the hopes of  
8 getting your guidance without having to put so much before you,  
9 we'll go from there and see what more needs to be done.

10 **THE COURT:** Okay. And the categories being? Do you  
11 have in mind --

12 **MR. HOWARD:** Those two that I just identified I  
13 think are the two primary ones that we are thinking about.

14 **THE COURT:** All right, so when could you tell the  
15 other side which documents you want to put before me.

16 **MR. HOWARD:** I think that they know. I mean, we  
17 have met and conferred on a whole host of documents, but, in  
18 advance of filing, we could tell them next week.

19 **THE COURT:** Like a week from today?

20 **MR. HOWARD:** A week from today.

21 **MR. COWAN:** You say in advance -- if we have them  
22 and we look at them -- we have gone back, just so you know, as  
23 you told us, we go in the front end, and certainly, when they  
24 are called into question, take the allegation that they're not  
25 privileged lightly. We're looking at that at our senior

1 associate level, at the partner level, and client-level  
2 attention.

3 And we will not, unless we have a good faith belief  
4 that it is privileged, we are not going to stand on it just  
5 because it was originally marked as such. So, once we get  
6 that, we will look at it. I would hope that reasonable minds  
7 won't differ on something they think is absolutely not  
8 privileged.

9 **THE COURT:** If they gave it to you in a week, how  
10 long would you need to either agree or tell them you still  
11 disagree and then they can file their motion?

12 **MR. COWAN:** A matter of three or four days. If we  
13 are talking about two or three documents, I don't think that's  
14 a big --

15 **THE COURT:** I think we are talking about six  
16 documents in two categories.

17 **MR. HOWARD:** We may be talking past each other.  
18 These are documents that they have clawed back.

19 **THE COURT:** So if you --

20 **MR. HOWARD:** There's no need to show them to them  
21 again.

22 **MR. COWAN:** If we have clawed them back, we have  
23 re-analyzed them.

24 **MR. HOWARD:** We would like to just file those and  
25 get moving.

1           **MR. COWAN:** But the thing I'm concerned about is we  
2 have clawed them back, and we have told them why, that before  
3 we go into motion practice that involved -- we want to hear  
4 what they have to say about it -- we don't want them -- we  
5 don't want to claw it back and say we think it's still  
6 privileged, here's the redacted document and then, immediately  
7 them to file a motion without going through the meet and confer  
8 process.

9           **THE COURT:** They are saying you clawed it back  
10 before some time ago, is what they are saying.

11           **MR. COWAN:** Right.

12           To my knowledge, unless I'm missing something, I'm  
13 not aware that we have met and conferred on the issue they are  
14 talking about bringing other than just a clawing back.

15           **THE COURT:** Well, okay, if you -- I mean, I don't  
16 need to have a conference to tell you what the Local Rules  
17 require, they require meeting and conferring. If you have, you  
18 have; if you haven't, you haven't.

19           If you need to meet and confer about whether you  
20 have meet and conferred --

21           **(Laughter.)**

22           **THE COURT:** -- I don't know what to say.

23           **MR. COWAN:** I don't think we need that. I think we  
24 need to understand precisely what the problems are and what  
25 they are going to seek relief from you and have an opportunity

1 to comment.

2 **THE COURT:** All right, all right. You can show them  
3 the motion you are going to file a day in advance.

4 **MR. HOWARD:** Fine.

5 **MR. COWAN:** That's fine.

6 **THE COURT:** When do you want to do that and then  
7 file?

8 **MR. HOWARD:** I think we can file by next Friday.

9 **THE COURT:** Okay. And so, we'll show it to them on  
10 next Thursday? Friday is the 1st -- yeah, so we'll show them  
11 the draft on 31st.

12 Show them in the morning of the 31st, okay? Can  
13 that be done?

14 **MR. HOWARD:** Yes.

15 **THE COURT:** Okay.

16 And then your opposition, if it does get filed, on  
17 Friday, a week later?

18 **MR. COWAN:** Yes that's fine, on the 8th.

19 **THE COURT:** And a reply two days later after that,  
20 or two working days later?

21 **MR. HOWARD:** So that would be the 12th, Your Honor?

22 **THE COURT:** What date would that be?

23 **MR. HOWARD:** They would oppose on the 8th; we would  
24 oppose on the 13th; would that be acceptable?

25 **THE COURT:** That's fine.



1           And I'll just take it under submission and decide  
2 what I'm going to do. I'll let you know if I need to address  
3 it. I suppose we could take it up at the case management  
4 conference.

5           **MR. HOWARD:** All right.

6           **THE COURT:** But I'll just rule on those documents  
7 and why, and then, you will have to decide what the  
8 implications are, and hopefully you can.

9           All right, what about this 30(b)(6) --

10          **MR. COWAN:** Before we move off of that, there was  
11 the issue before about on a claw-back process of whether they  
12 keep the documents, et cetera; is it your understanding that  
13 they would be submitting the documents to you?

14          **THE COURT:** Oh, good question. I don't really  
15 remember the issue.

16          **MR. COWAN:** Our concern was that once the document  
17 is clawed back, they shouldn't be using the document for any  
18 purpose. They can certainly refer to it, based on what they  
19 have seen before it's clawed back. But trying to file a  
20 document, et cetera, if it needs to be presented under seal, we  
21 will be happy to present it to the Court in camera for the  
22 in-camera review. We don't think they should be the ones  
23 handling our clients' privileged documents until the Court  
24 determines they are, in fact, not privileged.

25          **THE COURT:** It ought to be submitted in camera and

1 under seal. I don't know if it matters who does it.

2 **MR. HOWARD:** We had anticipated submitting it  
3 attached to our motion, to brief it and discuss it as we had  
4 discussed.

5 **THE COURT:** I can't remember what I said before.

6 **MR. COWAN:** My understanding was that the Court had  
7 instructed them by reading the protective order. I think it's  
8 the document we were referring to, that, while they could rely  
9 on the information they got prior to the claw-back, they  
10 shouldn't be using the document itself.

11 **THE COURT:** Do we have a transcript? I don't  
12 remember. Whatever I said, I'll stick with it.

13 **MR. MCDONELL:** My belief is that was covered in your  
14 written order.

15 **THE COURT:** It may be.

16 **MR. MCDONELL:** Not from the last one, from the prior  
17 hearing.

18 **THE COURT:** Could be. I do remember reading -- now  
19 that you mention it, I think I felt it read a certain way, and  
20 it may be that way. Whatever I did, just be consistent with  
21 that. If you can't use it, then they have to file it. And,  
22 you can tell them which number it is and have them file it.

23 I mean, in some ways this is fairly academic.

24 **MR. COWAN:** It is. I think the greater concern is  
25 that there is an ongoing use of the document we're calling as

1 privileged and discussion internally about it. Memories fade;  
2 there is some protection by the fading of the memory, that is  
3 our concern.

4 **THE COURT:** If it weren't -- if the agreement said  
5 something I was going to enforce it.

6 I will say that I don't think this -- this kind of  
7 thing deserves the same level of protection as, say, the secret  
8 spy documents, which --

9 (Laughter.)

10 **MR. COWAN:** Understood.

11 **THE COURT:** -- have to be erased from memory, if  
12 necessary, by extreme means.

13 **MR. COWAN:** Fair enough. It's more a process point  
14 for us, Your Honor. We are talking about six documents. It's  
15 not going to be the end of the world. But it's more on an  
16 ongoing basis.

17 **THE COURT:** Yeah, well, I can't elaborate anymore on  
18 that.

19 So is there anything else?

20 Okay, these other motions: Do you have to bring a  
21 motion on a 30(b)(6)?

22 **MS. HOUSE:** Well, we have -- we still await a  
23 response. Basically, what this motion has to do with is the  
24 fact that we want to essentially get some of our time back for  
25 witnesses that we think were woefully underprepared. And since

1 we have such a small amount of time, we offered, or gave a very  
2 clear explanation about why it was, and we made a record at the  
3 deposition as well. We have not yet heard back from them on  
4 whether they will give us back any time. If we need to, we may  
5 need to raise that to Your Honor.

6 **THE COURT:** So you are saying a seven-hour  
7 deposition really wasn't worth seven hours because the witness  
8 didn't know the answers so you should get an extra three hours?

9 **MS. HOUSE:** Right, something exactly like that. In  
10 fact, we offered specific times, but we have not yet heard  
11 back. And, it's been a while.

12 **THE COURT:** Okay.

13 **MR. MCDONELL:** I plan to have a letter out on this  
14 tomorrow, but can I get clarity?

15 Is the only request a request for more time? I had  
16 understood that it was requested that further witnesses be  
17 produced on these subjects, which is a different matter.

18 **MS. HOUSE:** It's a combination. The letters are  
19 very -- I just was trying to give a shorthand to the Court  
20 about what the order is about.

21 **MR. MCDONELL:** They do have a letter to us. We owe  
22 them a response. And expect it tomorrow. And it all has to do  
23 with what is the proper scope of a Rule 30(b)(6) deposition.  
24 We objected to the scope but produced the witness while  
25 reserving our objections. And they think we didn't have enough

1 detail, we thought we did.

2 So, this issue will be more focused among counsel by  
3 tomorrow. If they have a motion, presumably, they will take  
4 steps to try to schedule it.

5 **MR. MCDONELL:** To give you an example, they had a  
6 30(b)(6) notice on the SAP; they wanted a witness to testify on  
7 the acquisition of TomorrowNow. That is a very broad subject,  
8 so we objected. And, we said would will produce a witness with  
9 general information about that, but they won't know all the  
10 details. And, we reserve the right to produce the details  
11 through other witnesses.

12 One of the questions that came up in the deposition  
13 was:

14 **"Q.** Did you meet with representatives  
15 from TomorrowNow?

16 **"A.** Yes, we did.

17 **"Q.** How long did the meeting take?

18 **"A.** I don't remember."

19 So now they are moving to compel because he didn't  
20 remember how long the meeting took; we think that a bit of a  
21 nit for a 30(b)(6). And that is one example.

22 **THE COURT:** I will say, if that is the question, the  
23 kinds of questions you guys are going to ask me to rule on, I  
24 do not look forward to that. Those are the kind of small-time  
25 stuff, if that is, that ought to be resolved and then also

1 looked at -- I mean, could that answer be provided by some  
2 other means, like an interrogatory or a document of the meeting  
3 log, or something.

4 **MR. MCDONELL:** Sure.

5 So just -- and we have talked about this, but a  
6 preview of what my letter will say, we are trying to take --  
7 there are many complaints and classify them. So many of them,  
8 we think, are questions where the witness who actually would  
9 have the first-hand knowledge is on the deposition list  
10 already, anyway. And, our proposal is going to be to just ask  
11 the witness who already knows.

12 **THE COURT:** That would probably be fine, at least  
13 in the sense that I don't know why I would rule on 30(b)(6)  
14 until that already happened.

15 Now, it might be that if there was tons of "I don't  
16 knows" in a 30(b)(6), then I'd say somewhere you are going to  
17 get an extra hour or two. Whether it's with that person on the  
18 list on or the 30(b)(6) mechanism, hard to say which would make  
19 more sense.

20 **MR. MCDONELL:** I don't think the hours is that big a  
21 deal. The grand total of hours they are asking for is less  
22 than ten.

23 **THE COURT:** Maybe that is something you can reach an  
24 agreement on.

25 **MR. MCDONELL:** We'll talk about it.

1           **THE COURT:** If there is a motion that does not have  
2 to be brought and decided in the sense that you very well may  
3 get the information in some other way that is perfectly  
4 acceptable, I don't see why I should expedite it.

5           **MS. HOUSE:** Okay.

6           **THE COURT:** All right, so, "Motion to compel  
7 re-review and de-designation of the confidential"; what is that  
8 about?

9           **MS. HOUSE:** At the end of last hearing, I referenced  
10 to you the fact that we were somewhat dismayed at the  
11 incredible over-designation of highly confidential and  
12 confidential documents and previewed to you that we would need  
13 to get some relief.

14           Subsequent to that motion -- or to that hearing, we  
15 sent a letter with a log of the 27,000 highly confidential  
16 document designations and said, come on, guys, this stuff is  
17 supposed to be so super, super sensitive that it gets this very  
18 special treatment. We can't show it to our internal people.  
19 It's really stymying our ability to do this case, cut it out.  
20 And, moreover, here's this list.

21           **THE COURT:** So what has happened?

22           **MS. HOUSE:** Nothing. There has been no response.

23           **MR. COWAN:** Well, we have tasked an individual, a  
24 senior-level individual, to go back and look at those.

25           As you can see from the detailed affidavit of how we

1 do the custodian review, et cetera, it's a very involved  
2 process involving a number of lawyers. Some 91 lawyers have  
3 had their hands, at some point, on some of these documents.

4           There are subjective differences between 91 lawyers,  
5 as you might expect, on some of that. We think the best  
6 approach, based on their list they provided, is to have a one  
7 or a very small group of folks go through the 27 as quickly as  
8 possible, and tell them which ones we will and which ones we  
9 won't, and give them a finite list on what will be either  
10 re-designated or de-designated off of that list. And, we are  
11 doing that as quickly as possible.

12           **THE COURT:** I would say that usually, if there is  
13 differences among the reviewers, it's probably not highly  
14 confidential. In other words, a highly confidential is  
15 supposed to be truly, truly crown jewel-type of stuff.

16           **MR. COWAN:** Potentially. And, that is why we are  
17 trying to take out the vagaries of that process to make sure to  
18 the second process that we are having things that, yes, we will  
19 be willing to come in front of you and stand on those  
20 designations through a motion practice.

21           We think we have a defensible process in place. It  
22 is not infallible. And, we are reviewing it in earnest to do  
23 that. We have been, today, been able to resolve all these  
24 designation issues, I think, reasonably promptly.

25           **THE COURT:** So when would your process be done,



1 then, though?

2 **MR. COWAN:** Your Honor, it is hard to say, given the  
3 volume of documents we are talking about. But, we have an  
4 individual whose sole primarily duty is to get this done. And,  
5 we can start rolling them out on a rolling-out basis and  
6 letting them know that, so that they can start rolling them to  
7 the clients. And, we can do that on a weekly basis until  
8 that's done.

9 **THE COURT:** Do you have a priority of what -- I  
10 mean, you can direct what you want to them to look at first. I  
11 don't want to hear about it myself.

12 **MR. COWAN:** Yeah. If they have looked at them  
13 onesy-twosy, I would guess, if there is 27,000 documents, they  
14 have had some categorical or automatic way they've done that.  
15 Either way, we are looking at them on a onesy-twosy basis. So  
16 if they tell us which are their priorities, we'll focus on  
17 those first. Otherwise, we'll start at the top of the list and  
18 shell them out to them as we get them produced on a weekly  
19 basis.

20 **THE COURT:** Well, I mean, it's going through one by  
21 one, but there are some categories and the findings that, you  
22 know -- a document in a certain category is not, then I --

23 **MR. COWAN:** Right, absolutely. And when I say one  
24 by one, it's not one person reading every word and every line  
25 of the document. Sometimes you can tell from looking at the

1 document it clearly is or it clearly isn't moot, move on.

2 This review is being done electronically and not in  
3 paper form, and so it is time consuming, given the volume, but  
4 I think we can commit to getting on a schedule and getting it  
5 done.

6 **THE COURT:** Well, I guess I think you should give  
7 them a schedule.

8 **MR. COWAN:** Okay.

9 **THE COURT:** When can you do that?

10 **MR. COWAN:** I think we can get the first one rolled  
11 out by -- the first set rolled out by next Friday, and just get  
12 them done every --

13 **THE COURT:** But, if it's a thousand documents once a  
14 week, that is half a year.

15 I'm not going to talk about it any further now, but  
16 sit down, come up with a schedule that gets it done in a much  
17 shorter time than that. And you have the option, if you want,  
18 of directing which gets done first.

19 **MR. COWAN:** I think that makes sense, Your Honor.  
20 And I will have a better statistics next week of where we are  
21 on that process.

22 **THE COURT:** Okay.

23 **MR. COWAN:** Thank you.

24 **THE COURT:** So let them know sometime next week what  
25 your proposal is. But, in the meantime, tell them that you

1 have a priority.

2 All right, then you have some motions you are  
3 thinking about?

4 **MR. MCDONELL:** We are thinking they are not ripe.  
5 We are not asking they be scheduled now. We will take that up,  
6 as appropriate, at the next hearing.

7 **THE COURT:** Okay.

8 Obviously, I prefer to figure out a way to head at  
9 least some of these off.

10 **MR. MCDONELL:** Okay.

11 May I raise one other matter? And, I'm just going  
12 to ask this question purely in the abstract.

13 Rule 30 of the Federal Rules of Civil Procedure  
14 governing depositions includes, among other things, a provision  
15 that objections made at the depositions must be stated  
16 concisely, in an non-argumentative and non-suggestive manner.  
17 We're -- in order to head off disputes that might arise over  
18 time, does Your Honor have a clear philosophy on the rule?

19 **THE COURT:** I'm a strong supporter, if that is what  
20 you mean.

21 **MR. MCDONELL:** The rule as it's spoken, is the rule  
22 as it's enforced.

23 **THE COURT:** Right. I have been known -- I mean,  
24 maybe you all have already done this, but, after ten years, I  
25 probably have tons of decisions that you could look at on

1 recurring issues. And, one of the things I have been known to  
2 do is look at the index of the deposition and look at the ratio  
3 of lines spent on objections to testimony.

4 **MR. MCDONELL:** And speaking objections, in  
5 particular.

6 **THE COURT:** Well, I mean, obviously, if there were  
7 valid privilege objections, et cetera, yeah. I don't like  
8 coaching and I don't like extended objections.

9 **MR. MCDONELL:** Thank you, Your Honor.

10 **THE COURT:** But, I mean, I can't say -- obviously,  
11 valid objections need to be made.

12 **MR. MCDONELL:** Of course. Thank you.

13 **MS. HOUSE:** That's it.

14 **MR. MCDONELL:** Nothing further.

15 **THE COURT:** All right.

16 **THE CLERK:** Courts is in recess.

17 (Proceedings adjourned at 3:40 p.m.)

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**CERTIFICATE OF REPORTER**

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

**/s/ Sahar McVickar**

**Sahar McVickar, RPR, CSR No. 12963**

**Wednesday, July 30, 2008**